Supreme Court, U.S.
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No. 00-1305

In the

Supreme Court of the United States

Kismet Investors, Inc., a Minnesota Corporation,

Petitioner,

vs.

The County of Benton, Minnesota,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court and the Minnesota Court of Appeals properly determined that the presence of a hundred potential sites for adult uses in Benton County constitutes "sufficient alternative avenues of communication."

2. Whether the trial court and the Minnesota Court of Appeals properly granted summary judgment on the question of whether the Benton County adult use ordinance is "narrowly tailored."

3. Whether the trial court and the Minnesota Court of Appeals properly rejected the claim that the Benton County Development Code's failure to quantify the precise number of parking spaces required at Petitioner's nude dancing establishment means that the county has enacted an impermissible prior restraint of speech or rendered identified sites unavailable.

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While the Petitioner has included in its appendix two separate orders of the trial court, dated July 1, 1999 and December 27, 1999, and provided to this Court the decision of the Minnesota Court of Appeals upon which the Minnesota Supreme Court denied review, Petitioner has failed to provide in its appendix a copy of a related order, dated April 2, 1999, wherein the trial court decided various zoning matters in favor of Respondent. Accordingly, this related order is provided in Respondent's Appendix at 1a.

STATEMENT OF THE CASE

Since the early 1990's Petitioner has operated a nude dancing establishment known as "The King's Inn" in rural Benton County. When the establishment first opened in a location that had previously been used as a restaurant, Benton County had no contemporary adult use ordinance in place. After unsuccessfully attempting to enforce its conditional use permit ordinance to regulate the business, Benton County set forth on a lengthy process that lead it to adopt a contemporary adult use ordinance--an ordinance designed for the specific purpose of minimizing the adverse secondary effects of adult businesses.

A. Benton County's Review of Adverse Secondary Effects Caused by Adult Uses and Adoption of Ordinance.

The process leading to the adoption of the adult use ordinance was deliberate and measured. Between June of 1993 and July of 1994, adoption of an adult use ordinance was discussed at more that a half-dozen meetings of the County Board and County Planning and Zoning Commission. Pet. App. 28a-31a. During these meetings county officials

reviewed studies discussing the adverse secondary effects, including studies from the following communities: St. Cloud, Minnesota; Phoenix, Arizona; Adams County, Colorado; St. Paul, Minnesota; Indianapolis, Indiana; Los Angeles, California; Amarillo, Texas; and Austin, Texas. Pet. App. 87a. County officials also reviewed a report of the Minnesota Attorney General that dealt with the regulation of adult businesses and discussed adverse secondary effects related to adult businesses.

No representatives of Petitioner's business participated in the public process of consideration and adoption of the adult use ordinance. Minutes of the various meetings reflect that no evidence was offered to rebut a wealth of evidence put before county officials, all of which suggested that numerous adverse secondary effects are associated with adult uses. Pet. App. 31a.

The ordinance that was adopted by Benton County followed a familiar path: limiting adult use locations to commercial and industrially zoned areas and providing setbacks from residentially zoned areas, schools and churches. Pet. App. 94a-95a. The ordinance provided for a 500 foot setback from these residentially zoned areas. Because the Petitioner's establishment was only about 150 feet from a residentially zoned area, it was nonconforming. Pet. App. 32a-33a. The adult use ordinance contained an amortization provision, requiring "The King's Inn" to come into conformity within four years, by July 31, 1998.

B. Petitioner Requests a Variance from Ordinance Provisions and Hearing is Held on Variance Request.

"The King's Inn" took no steps to challenge any portion of the ordinance until nine days prior to the expiration of the amortization period, July 22, 1998. At this time Petitioners applied for a variance from the amortization period. Pet. App.

33a. In connection with the request for a variance, the Benton County Board of Adjustment, outside of the hours of operation for the business, inspected the property to determine its suitability for other uses. A hearing was also held in connection with the variance request. The hearing dealt with issues pertaining to the propriety of a variance. Resp. App. 20a-32a. While several nude dancers and the facility's owner testified on behalf of the variance request, neighbors testified that the establishment interfered with the enjoyment and use of their property. Resp. App. 24a-32a. One adjacent resident testified that patrons of the establishment damaged his property and engaged in verbal abuse, yelling and screaming in the parking lot adjacent to his residence. Resp. App. 24a-25a. Others spoke of problems and potential problems related to drug and alcohol use by those visiting the establishment. Another resident in the immediate area of the establishment related shocking details of threats from the establishment's owner. These threats included threats to her husband's physical safety; threats of gang violence; threats to run her family out of its home; threats to hurt her children; and threats to rape her. Resp. App. 28a-29a.

A wealth of public discussion took place at this meeting concerning the feasibility of using the restaurant for other purposes--an issue that relates primarily to whether a variance should be granted. Resp. App. 28a-32a. In addition to the testimony regarding the specific outrageous conduct by the owner of the establishment and other impositions on the neighboring residences, several citizens also testified regarding the adverse secondary effects that generally accompany adult businesses. Resp. App. 21a-32a. The variance was denied and this suit followed.

C. Procedural History.

The suit was initially bifurcated. The trial court first dealt with the issues relating to a variance appeal. The court, by

order and detailed findings and conclusions dated April 2, 1999, resolved the zoning and injunction issues in favor of Respondent. Resp. App. 1a-19a. The court then proceeded to the merits of the constitutional challenges advanced by Petitioner in connection with subsequent motions.

The majority of the constitutional issues were decided by the trial court's second order, dated July 1, 1999. The trial court specifically found that Benton County had complied with requirements set forth by this Court in Renton v. Playtime Theatres, 475 U.S. 41, 46 (1986):

> Benton County relied upon numerous studies which reviewed adult use and sexually-oriented businesses, both within Minnesota and outside of it and in both rural and urban settings. Those studies identified specific adverse secondary effects attributable to adult use businesses and it is reasonable for Benton County to have relied upon them in establishing their ordinance. The studies examined reasonably similar businesses which provided the commission and the Benton County Board sufficient information to enact the ordinance.

Pet. App. 68a. The court also rejected the contention that Petitioner's criticism of the studies relied upon rendered the Benton County adult use ordinance unconstitutional:

> The county enacted the ordinance on the strength of thorough research, documented studies, public hearings and considered deliberations. As the new studies and evidence were not before the commission or the Benton County Board at the time of the enactment of the ordinance, they were not part of the commissioners' or the Board members' deliberations.

Pet. App. 69a. The court went on to rule that a trial was required on the sole issue of whether the ordinance allowed sites to which adult businesses might locate so that there were "sufficient alternative avenues of communication." Renton, 475 U.S. at 54.

The trial of the matter was held on November 12, 1999. Respondent called one witness, Ronald Peterson, the Benton County Development Director. Peterson testified that there were 101 sites available for adult uses in the commercial and industrial zoned areas of Benton County. The trial court found that Peterson was a credible witness. Pet. App. 33a.

Petitioner called two witnesses. The trial court found that the testimony of each of these witnesses was not believable. Pet. App. 34a. Robert McLaughlin, an expert witness called by Petitioner, argued that none of the 101 sites identified by the county were available because the county had parking requirements for development and that if these parking requirements were interpreted in a whimsical manner then none of the sites would be available. Id. The trial court rejected McLaughlin's opinions and his conclusions with respect to this issue. Id. The testimony offered by Petitioner's second witness, an adult business owner who owned adult businesses in Wisconsin, was held by the court to be irrelevant because of his lack of familiarity with building regulations in Benton County. Id.

The trial court found that one of the 101 sites identified by Respondent was not available, but that the 100 sites that were available provided sufficient alternative avenues of communication. Pet. App. 35a. The court also rejected the contention that the parking provisions of the Benton County ordinance rendered sites unavailable. Pet. App. 36a. In its memorandum accompanying the order, the court noted that Petitioner's fear of unreasonable enforcement of parking requirements was unfounded:

> Plaintiff finally contends that all the sites are legally inadequate because they are available only in the discretion of the governmental officials of Benton County. The substance of Plaintiff's argument is changing from a current industrial or commercial use to an adult use would trigger a zoning review and the county could require off-street parking spaces "as determined by the County Planning Commission."... Plaintiff argues that this "unbridled discretion" could be used to impose impossible to provide parking requirements, thus preventing location of an adult business.
>
> This argument is unfounded in fact and highly speculative in outcome. Many of the identified sites are large enough to accommodate any reasonable parking requirements. Counties are required by statute to act on zoning matters within 60 days of a request.

Pet. App. 45a. The court went on to note that any arbitrary or capricious decision by county personnel could be promptly reviewed. Pet. App. 45a-46a.

Petitioner then appealed to the Minnesota Court of Appeals, which affirmed the trial court's ruling in favor of Respondent. Kismet Investors, Inc. v. County of Benton, 617 N.W.2d 85 (Minn. Ct. App. 2000). In its opinion the Minnesota Court of Appeals, after first addressing the merits of the zoning appeal, which is not now before this court, relied heavily on this Court's decision in Renton and found that Benton County's Adult Use Ordinance passed constitutional muster under the test set forth in Renton. Pet. App. 17a, 20a, 23a.

The Minnesota Court of Appeals also rejected Petitioner's assertion that the Benton County Development Code might be interpreted in a manner that would permit

county officials to deny a land use permit to a prospective adult use establishment on the theory that the establishment did not have enough parking spaces. Pet. App. 22a. The court distinguished the situation before it from those situations where adult use ordinances make the ability to operate an adult use ordinance contingent on discretionary approvals by the government officials, and specifically held that these parking regulations did not inhibit Petitioner's right to operate an adult use establishment. Id.

Petitioner then petitioned for review before the Minnesota Supreme Court. Review was denied by order dated November 15, 2000. Pet. App. 1a.

REASONS FOR DENYING THE PETITION

I. RESPONDENT'S ORDINANCE IS "NARROWLY TAILORED" PURSUANT TO RENTON AND THIS CASE DOES NOT PRESENT FACTS THAT WOULD SUPPORT THE CONTENTION THAT NO ADVERSE EFFECTS WERE CAUSED BY PETITIONER'S OPERATIONS.

Respondent asserts that Benton County's ordinance is not "narrowly tailored" and is therefore unconstitutional. This argument ignores controlling precedent of this Court. Proper analysis of the constitutionality of an adult use ordinance under Renton depends on consideration of the following requirements: the ordinance must be content-neutral; it must be designed to serve a substantial governmental interest; and it must not unreasonably limit alternative avenues of communication. Renton, 475 U.S. at 47-49. Here Benton County's numerous meetings investigating the adverse secondary effects caused by adult businesses and its consideration of a wealth of studies examining the effects of such businesses compel the conclusion that Benton County made the showing required by Renton.

The assertion that the Benton County ordinance is not "narrowly tailored" fails upon a careful reading of Renton. When an ordinance is enacted so as to address adverse secondary effects attributable to a particular category of adult businesses, the ordinance is tailored to regulate that category of businesses and is "narrowly tailored." Renton, 475 U.S. at 52.

The notion that Petitioner's business should be exempted from consideration as an adult use responsible for adverse secondary effects should be rejected. The record in this matter included evidence that the presence of this particular business was causing harm and aggravation to neighboring residents. Resp. App., 24a-29a. Thus, even if this court were to create a "good neighbor" exception to the criteria stated in Renton, this would not be the case to do it. Further, the self-serving testimony of an expert discredited by the trial court's finding that the expert was not credible, hardly constitutes a proper occasion for examination of whether this Court should expand upon the clear directives provided in Renton.

II. THE PROVISIONS OF THE ORDINANCE AMORTIZING NON-CONFORMING ADULT USES ARE CONSTITUTIONAL.

Petitioner contends that the Benton County Adult Use Ordinance is unconstitutional as a result of its amortization of non-conforming adult uses. This argument ignores a wealth of precedent granting governments the right to amortize non-conforming adult uses. Amortization provisions have been upheld by both state and federal courts in Minnesota as long as the amortization period is reasonable. Holmberg v. City of Ramsey, 12 F.3d 140 (8th Cir. 1993); Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991); Naegele Outdoor Advertising Co. of Minn. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968). Other federal courts have uniformly permitted amortization of existing non-conforming

adult businesses as long as the amortization period is not punitively short. See David Vincent, Inc. v. Broward County, Florida, 200 F.3d 1325 (11th Cir. 2000); Ambassador Books & Video, Inc. v. City of Little Rock, Ark., 20 F.3d 858, 865 (8th Cir.1994); SDJ v. City of Houston, 636 F.Supp. 1359, 1370 (S.D.Tex.1986), aff'd, 837 F.2d 1268, 1278 (5th Cir.1988)). Benton County's amortization provision was a full four years in duration and compares favorably with the duration of other amortization provisions that have been upheld. See Ambassador Books, 20 F.3d at 865 (three-year amortization provision valid); Alexander, 928 F.2d at 280 (two-year amortization provision valid).

Plaintiff's argument regarding amortization seems to be that while the amortization provision may have been reasonable at the time it was enacted, the history of the site during the amortization period should stand as evidence that this particular location's operation leads to no adverse secondary effects. Of course, as discussed above, the record here shows that there were adverse secondary effects associated with the business between the time the ordinance was passed and the time the amortization period expired. Apart from this, Petitioner's argument calls for governmental entities who have found adverse secondary effects to exist with respect to certain categories of adult uses to wait until specific adult businesses actually result in harm to the community before they can take action. Municipalities are not required to wait until the adverse effects of businesses are felt before adopting measures for the public good. Instead, the proper constitutional inquiry is limited to whether the ordinance is "designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." Renton 475 U.S. at 50. The notion that "good behavior" by an adult use during an amortization period can render the ordinance unconstitutional runs contrary to the jurisprudence of this court. Such a notion also is contrary to common sense, since it would require a

governmental entity to actually permit adverse secondary effects before enacting measures to avoid them.

III. GENERAL PARKING PROVISIONS OF BENTON COUNTY'S DEVELOPMENT CODE APPLICABLE TO ALL BUSINESSES DO NOT RENDER THE ADULT USE ORDINANCE UNCONSTITUTIONAL SIMPLY BECAUSE PETITIONER CAN INVENT A FANCIFUL INTERPRETATION THAT WOULD RENDER SITES UNAVAILABLE.

Petitioner last advances the argument that provisions of the Benton County Development Code that impose routine parking requirements on all properties render the sites identified by the county unavailable. All businesses in Benton County are required to abide by a provision of the Benton County ordinance that states:

> (c) Required off-street parking spaces shall be provided as determined by the County Planning Commission.

Benton County Development Code, section 9.2.1 (c). Resp. App., 33a. The ordinance then goes on to specify parking location requirements and design requirements in sections 9.2.3 and 9.2.4. Resp. App., 34a-35a. Petitioner's complaints relating to discretion are not in this instance a direct challenge to the Benton County ordinance provision that Petitioner contends vests excessive discretion in public officials. The sole issue that remained for trial after the court's first two orders was whether or not Petitioner was presented with "reasonable alternative avenues of communication." Petitioner thus could not directly challenge the parking ordinance or the land use permit ordinance. Further, Petitioner does not want its complaints relative to these provisions to be seen as direct constitutional challenges. If the parking

ordinance provisions, wholly separate from the adult use ordinance, were unconstitutional, this would simply mean that they would not be enforceable against adult uses in Benton County and the effect of such a ruling would be to remove any impediment to availability created by the provision found to be unconstitutional.

There is no question that a court ruling invalidating the parking requirements would not affect the vitality of the wholly separate and unrelated adult use provisions of the code. Section 12.1.2 of the code provides:

> If any court of competent jurisdiction shall adjudge any provision of this ordinance to be invalid, such judgment shall not affect any other provisions of this ordinance not specifically included in such judgment.

Resp. App. 36a. Petitioner's complaint with respect to the parking ordinance is not and cannot be that it is unconstitutional, since such an argument would both exceed the scope of the issues litigated and be of no avail to Petitioner.

The Minnesota Court of Appeals addressed and properly rejected Petitioner's argument with respect to the requirements of the parking ordinance. The court first recognized that zoning provisions that allow adult uses only at the unfettered discretion of a locality violate the First Amendment, citing the very authority now cited by petitioner, Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358, 1361-62 (11th Cir. 1999), cert. denied, ___U.S.___, 120 S.Ct. 1554 (2000). Pet. App. 22a. The court then also acknowledged that a licensing scheme or a scheme that permitted an adult use to operate only upon obtaining a discretionary zoning exception precluded reasonable alternative avenues of communications. Id. But the court noted that the Benton County parking requirements do not

give county officials discretion to deny Kismet's ability to operate an adult use in Benton County and thus are distinguishable from the cases cited by Petitioner. Id.

In contrast to those ordinances where adult use licensing requirements have been successfully challenged, Benton County's ordinance does nothing to target adult businesses with respect to any of the areas of discretion discussed by Petitioner. The parking provisions of which Petitioner complains do not target adult businesses and must be complied with by all landowners in Benton County.

Petitioner's argument that parking regulations might be used to keep out adult businesses is without merit. Petitioner argued below that there is no grid or table that can be referred to which tells property owners the precise number of parking spots that they must provide. Petitioner has voiced the fear that Benton County will use the parking lot regulation to require excessive numbers of parking spots. Even if Benton County required three or four times the number of parking spots that the Petitioner's establishment presently provides, numerous parcels would still be available given that some of the parcels are dozens of acres in size and most are several acres in size. Pet. App. 45a. Most of the parcels identified by the county at trial would accommodate parking requirements even if the parking regulations were interpreted in a very stringent manner. Id.

It is apparent from Petitioner's arguments that it is concerned not only that they might be required to provide three or four times as much parking as is currently used at the King's Inn, but that it even fears that the county might require 100 times (or some other ridiculous amount) the number of parking spots that are presently used and thereby render all of the identified parcels unavailable.

If the county were to take such an arbitrary and capricious position with respect to the parking lot requirements, Petitioners would not be without a remedy. Decisions of the County Planning Commission are appealable

as of right to Minnesota courts through writ of certiorari. Minnesota statute provides that where no right of judicial review is provided, there is a right to petition for a writ of certiorari. Minn. Stat. § 606.01. Review by writ of certiorari is available whenever there is no precise mechanism for review defined in the statute or ordinance. Shetka v. Aitkin County, 541 N.W.2d 349, 354 (Minn. Ct. App. 1995), review denied (Minn. Feb. 27, 1996); Neitzel v. County of Redwood, 521 N.W.2d 73, 76 (Minn. Ct. App. 1994), review denied (Minn. Oct. 27, 1994). Upon review by writ of certiorari, any decision that is "arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it" will be reversed. Dietz v. Dodge County, 47 N.W.2d 237, 239 (Minn. 1992); Scott County Lumber v. City of Shakopee, 417 N.W.2d 721, 727 (Minn. Ct. App. 1988), review denied (Minn. Mar. 23, 1988). The availability of the writ of certiorari in the Minnesota courts assures that any arbitrary or oppressive decision by the county is subject to meaningful judicial review.

Moreover, Petitioner need not be concerned that the County might fail to decide parking lot issues so as to effectively deprive Petitioner of the ability to open an adult use establishment. Minn. Stat. § 15.99, subd. 2 requires counties to issue prompt decisions with respect to matters that are brought before them. It provides:

> Except as otherwise provided in this section and notwithstanding any other law to the contrary, an agency must approve or deny within 60 days a written request relating to zoning, septic systems . . . or other governmental approval of an action. Failure of an agency to deny a request within 60 days is approval of the request. If an agency denies the request, it must state in writing the reasons for the denial at the time that it denies the request.

Minn. Stat. § 15.99, Subd. 2. This statute operates to assure that the county will make its determination on matters brought before it within 60 days.

Petitioner's concerns regarding parking lot requirements are simply unfounded. If a large number of parking spaces are required, Petitioner is still able to purchase property and open an establishment that will accommodate any amount of vehicles that might reasonably be required by the County. If the County acts in an arbitrary and capricious manner, Petitioner has a mechanism for review and will obtain a prompt determination with respect to the issue. For these reasons, the sites identified are available so that Petitioner does have "reasonable alternative avenues of communication" and the decisions of the lower courts on this issue should stand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: March 15, 2001

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STATE OF MINNESOTA **IN DISTRICT COURT**

COUNTY OF BENTON SEVENTH JUDICIAL DISTRICT

Kismet Investors, Inc., a Minnesota corporation,	)	Court File No. CO-98-1240
Plaintiff,	)	
	)	**FINDINGS OF FACT**
v.	)	**CONCLUSIONS OF LAW AND**
	)	**ORDER FOR JUDGMENT**
County of Benton,	)	**AND JUDGMENT**
Defendant.	)	

The above-entitled matter came before the Honorable James W. Hoolihan, Judge of District Court, on the 9th day of March, 1999.

Randall D.B. Tigue, Esq., appeared on behalf of the Plaintiff, Kismet Investors, Inc.

Kenneth H. Bayliss, Esq., appeared on behalf of the Defendant, County of Benton.

This case is an appeal from the denial of a variance by the Benton County Board of Adjustment. Plaintiff requests a temporary injunction and a temporary restraining order to prohibit the Defendant from taking any action, civil or criminal, to enforce the provisions of Benton County Ordinance No. 242 against the Plaintiff. The parties have agreed to bifurcate the issues raised in the Complaint and have the Court determine at this time, in conjunction with the motion for a temporary injunction, the issue of whether the denial of a variance by Benton County Board of Adjustment was wrongfully determined. The constitutional and damage issues are reserved.

Now, having considered the arguments of counsel, the documents and proceedings herein, together with the applicable law, this Court makes the following:

FINDINGS OF FACT

1. In 1994, the Benton County Board of Adjustment (Board) adopted as part of the Benton County Development Code, Ordinance No. 242 which prohibits, after a four-year amortization period, adult use businesses from operating within 500 feet of residentially zoned areas. Adult businesses are allowed to operate in B, B-2, I-1 and I-2 zones. Plaintiff's business is lawfully in a B zone.

Benton County Development Code, 7. 10. 3, states:

> Adult uses established prior to the enactment of Benton County Ordinance 235 shall be permitted and regulated as nonconforming uses until July 31, 1998 at which time such uses shall become unlawful.

Benton County Development Code, 7.10.2 states:

> No adult use shall be located within five hundred (500) feet of:
>
> 1. Any area zoned R-1, R-2, or R-3. [residential areas]

2. The Plaintiff, Kismet Investors, Inc., a Minnesota corporation, has operated a business known as "King's on the Lake," in Benton County since January 2, 1997. The Plaintiff purchased said business in January of 1997 and subsequently purchased the real property, which is the subject of this action, one year later in 1998 for approximately $250,000. The business features live, dance entertainment which the

parties have variously described as "non-obscene", "nude" and "cabaret" dancing and is currently doing business as "The King's Inn."

3. The Plaintiff's business property is located approximately 150 feet from the nearest residence. The residence is lawfully located within a residentially-zoned area.

4. On July 22, 1998, Plaintiff applied for a variance from the Board to continue operations after the end of the amortization period. The application was received by the Board approximately nine (9) days prior to the end of the amortization period.

5. Hearings on the request for a variance were held by the Board on August 20, 1998 and September 17, 1998. The board members made a physical, on-site inspection of the property prior to the August 20, 1998 hearing.

6. On August 20, 1998, the Board held a public hearing for consideration of the Plaintiff's request. The Plaintiff presented information from a planning review performed by the Plaintiffs consultant, R. Bruce McLaughlin. Plaintiff presented information regarding the cost of improvements which were made to the property and claimed it would suffer hardship if the variance request was not granted. The Board decided to table the request to the next scheduled Board meeting, study and examine the information provided to it and schedule a second on-site inspection of the property.

7. The Board inspected the property a second time before the September 17, 1998 meeting to reconsider the application for a variance from the Plaintiff.

8. The Board met on September 17, 1998 to consider the variance application of the Plaintiff. A public hearing was again held and the hearing was recorded. A verbatim transcript from the hearing was produced. The Plaintiff gave a presentation to the Board through its attorney, Randall Tigue. Plaintiff presented testimony from its owner, Keith Keller, a video tape of the property and the testimony of

witnesses, including some of the employed dancers from "The King's Inn." Plaintiff also presented the planning review from its expert, R. Bruce McLaughlin.

9. The Board heard from several members of the public concerning the granting of the variance for continued operation of the adult business. At least twelve (12) members of the public spoke in opposition to the granting of the variance. They gave testimony regarding the alternative uses of the property; the lack of hardship for the business property if the variance was not granted; disturbances allegedly caused by the business to the residential area; prior alternative uses of the property; the reduction in property values and rates of appreciation in the area; the validity of setbacks and secondary negative effects of the business; criminal behavior and drug use at the location of the business; alleged threats of violence upon adults and children of family residents in the area directly connected to the variance issue; and safety concerns of residents regarding the business.

10. At the conclusion of the September 17, 1998 meeting, the Board denied the requested variance and on October 15, 1998 issued written findings on the separate factors required for granting the variance. The Board specifically found that the Plaintiff proposed to continue to operate an adult use facility after the conclusion of the amortization period. They also found:

a) the proposed use is adult use, and is not prohibited in the business district in which it is located;
b) the variance would not be in harmony with the general purposes and intent of the Ordinance;
c) the Plaintiff had not demonstrated a hardship;
d) the concerns of the Plaintiff were solely economic;
e) the property could be put to an alternative reasonable use;

f) the Plaintiff failed to demonstrate a plight that is due to circumstances unique to the property;
g) the Plaintiff purchased the property with constructive knowledge of the Ordinance;
h) the variance, if granted, would alter the family neighborhood character of the locality.

CONCLUSIONS OF LAW

Benton County Board of Adjustment's decision denying the variance application

1. The role of the judiciary in countermanding zoning decisions by civil authorities should be restrained. "The court's authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked. ... [I]t is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in the performance of their duties." White Bear Docking and Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174, 175 (Minn. 1982).

2. When reviewing a zoning matter, where the municipal body's proceeding was fair and the record clear and complete, review should be on the record. Where the body has proposed formal findings contemporaneously with its decision and there is an accurate verbatim transcript of the proceedings, the record is likely to be clear and complete. Swanson v. City of Bloomington, 421 N.W.2d 307, 313 (Minn. 1988). The parties are entitled to a trial where the body has failed to make a complete and adequate record of its proceedings in zoning matters. Id., at 312. *See* Honn v. City of Coon Rapids, 313 N.W.2d 409 (Minn. 1981).

3. An accurate, complete and clear record was made as part of the Benton County Board of Adjustment's meetings where the Defendant's variance request was denied and it is proper to decide the validity of that denial based upon a review of the record rather than by conducting a trial.

4. The test for determining whether the denial of a zoning variance request was proper is whether the zoning authority's action was reasonable or unreasonable, arbitrary or capricious. Swanson v. City of Bloomington, 421 N.W.2d at 311 (citing White Bear Docking and Storage, Inc., 324 N.W.2d at 176) (quoting Honn, 313 N.W.2d at 417). In determining whether the decision was reasonable, the Court must examine whether the reasons given by the body, in denying the variance application, were legally sufficient and had a factual basis. Id., at 313. *See* C.R. Investments, Inc. v. Village of Shoreview, 304 N.W.2d 320, 325 (Minn. 1981).

5. The Minnesota legislature has delegated to municipalities the power to plan for the use of the land within their boundaries by establishing zoning and planning ordinances. VanLandschoot v. City of Mendota Heights, 336 N.W.2d 503, 507 (Minn. 1983). *See* Minn. Stat. §462.351 (1982). Counties in Minnesota have also been given the authority to establish zoning and planning ordinances. *See* Minn. Stat. 394.21 (1998).

6. A municipal decision-making body, has broad discretionary power to deny an application for a variance. Hedlund v. City of Maplewood, 366 N.W.2d 624, 626 (Minn. Ct. App. 1985) (citing VanLandschoot, 336 N.W.2d at 508-9.) "The fact that a court reviewing the action of a municipal body may have arrived at a different conclusion, had it been a member of the body, does not invalidate the judgment of the city officials if they acted in good faith and within the broad discretion accorded them by statutes and the relevant ordinances." VanLandschoot, 336 N.W.2d at 509. (citing White Bear Docking, 324 N.W.2d at 176). "The setting aside of routine municipal decisions should be reserved for those rare instances in which the [county's] decision has no rational basis." White Bear Docking, 324 N.W.2d at 176.

7. The Benton County Development Code states that the Board, "shall have the exclusive power to order the

issuance of variances from the terms of any official control..." Benton County Development Code, 11.4.8. The Code sets forth the standards for granting or denying variance requests in Benton County Development Code 11.5.1. These standards are:

(1) The proposed use is not prohibited in the zoning district in which the subject property is located.
(2) The variance must be in harmony with the general purposes and intent of the ordinance.
(3) The terms of the variance must be consistent with the comprehensive plan.
(4) The landowner must show that the variance is necessary to alleviate practical difficulties or particular hardship in the way of carrying out the strict letter of the ordinance.

"Hardship" as used in connection with the granting of a variance means:

a. The property in question cannot be put to a reasonable use if used under the conditions allowed by the ordinance;
b. The plight of the landowner is due to circumstances unique to the property, not created by the landowner;
c. The variance, if granted, will not alter the essential character of the locality.

Economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of the ordinance.

8. The Benton County Ordinance closely follows Minn. Stat. §394.27, Subd. 7 which states:

Creation and duties of a board of adjustment.

Subd. 7. Variances; hardship. The board of adjustment shall have the exclusive power to order the issuance of variances from the terms of any official control including restrictions placed on nonconformities. Variances shall only be permitted when they are in *harmony with the general purposes and intent* of the official control in cases when there are *practical difficulties or particular hardship in the way of carrying out the strict letter of any official control,* and when the terms of the variance are *consistent with the comprehensive plan.* "Hardship" as used in connection with the granting of a variance means the property in question cannot be put to a reasonable use if used under the conditions allowed by the official controls; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality. Economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of the ordinance. Variances shall be granted for earth sheltered construction as defined in section 216C.06, subdivision 2, when in harmony with the official controls. *No variance may be granted that would allow any use that is prohibited in the zoning district in which the subject property is located.* The board of adjustment may impose conditions in the granting of variances to insure compliance and to protect adjacent properties and the public interest. The board of adjustment may consider the inability to use solar energy systems a "hardship" in the granting of variances. (emphasis added.)

9. The proposed use of the Plaintiff's business, known as "The King's Inn" is not prohibited in the zoning district in which the subject property is located.

10. The Defendant had a rational basis for deciding the variance was not in harmony with the general purposes and intent of the setback ordinance.

Setback requirements are a reasonable way of implementing the general purposes and intent of municipal ordinances. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51, 106 S.Ct. 925, 930, 89 L.Ed.2d 29 (1986). The general purpose and intent of Benton County's setback requirement is to protect residential neighborhoods from the negative secondary effects associated with adult businesses. This protection is a valid, indeed, substantial government interest. *See* Id. at 50-51. The Minnesota Court of Appeals has also approved of the use of setback ordinances to protect residential neighborhoods from negative secondary effects of adult-oriented businesses. City of Crystal v. Fantasy House, Inc., 569 N.W.2d 225 (Minn. Ct. App. 1997).

The Board had specific facts upon which it relied in making its determination that the variance was not in harmony with the general purposes of the setback ordinance. The Board examined and considered studies from the Plaintiff's consultant and numerous studies of negative secondary effects produced by adult-oriented businesses. This information was provided by the City of St. Paul; the Minnesota Attorney General's office; the City of Indianapolis, Indiana; Rochester, Minnesota; Los Angeles, California; Phoenix, Arizona; Adams County, Colorado; Amarillo, Texas; and Austin, Texas. The studies found, among other things that adult-oriented businesses increase crime in the areas, increase noise, traffic and glare, and have negative impacts on property values. A zoning authority may properly rely upon studies from other cities when making determinations regarding variances and whether they are harmonious with the general purposes of setback ordinances.

Id. The authority need not conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the authority relies on is reasonably believed to be relevant to the problem that the authority addresses. Id., at 229 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52, 106 S.Ct. at 931 (1986).

The Board also heard from numerous members of the community who presented reasonable concerns and facts associated with the Plaintiff's business. Testimony was given regarding low property values, unsafe conditions near the business and criminal activity in the area of the business. These were consistent with the conclusions of various negative secondary effects produced by adult businesses and specifically associated with "The King's Inn."

In this matter, Benton County reasonably relied upon information and studies which examined a number of adult-oriented businesses and the negative secondary effects produced by them. Therefore, the Board's determination that the requested variance was not in harmony with the general purpose and intent of the ordinance to protect residential neighborhoods from harmful negative secondary effects of adult businesses and the conclusion that the variance, if granted, would alter the family neighborhood character of the locality were based upon facts and legally sufficient reasons.

11. The comprehensive plan of the Benton County Development Code is to eliminate nonconforming uses of zoned property. *See* Benton County Development Code, 7. 10. 3. The facts show that the proposed adult use which would be permitted by the granting of a variance would be inconsistent with the comprehensive plan. Therefore, the determination of the Board to not grant the variance was based upon legally sufficient and rational reasons.

12. The Plaintiff has not shown that a variance is necessary to alleviate practical difficulties or particular hardship in order to carry out the ordinance. By the terms of

the Benton County Development Code, 11. 5. 1, economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of the ordinance.

The Plaintiff presented evidence to the Board of the changes and modifications made to the structure of "The King's Inn" to better facilitate its 'adult use' and the costs of such improvements. These modifications included a runway for dancers, a modified ceiling and roof, specialized lighting and sound equipment and security equipment. The Plaintiff claimed that the facility could not be put to any other reasonable use if used in conformity with the ordinance.

Formally the property involved in this case was a restaurant. The facts and review of the video tape of the property do not exclude this as a reasonable use for the property again. It may also be reasonably used for office space or other commercial ventures. The improvements to the property in the way of the runway, lighting, sound and security equipment could be easily removed without incurring unreasonable costs. The roof modifications could remain for alternate uses for the building and the air conditioning and heating systems and the interior ramps would be required for any occupancy. Since a reasonable use for the property does exist under the terms of the Benton County Ordinance, these considerations by the Plaintiff are economic and therefore do not constitute a hardship.

The Plaintiff has also failed to show that its plight is due to circumstances unique to the property which were not created by the landowner. The Plaintiff purchased the business of "King's on the Lake" in January of 1997 for approximately $250,000. The then owner of the property made modifications to the building to better facilitate its adult-use and then sold the real property to the Plaintiff in January of 1998. Though it cannot be said that the Plaintiff in this case created the plight which now exists, it knew of the plight at the time it purchased the property.

Therefore, the Plaintiff has not shown that the hardship is unique to the real property involved because the real property can reasonably be used for other purposes exclusive of its adult-use.

The Plaintiff claims the variance, if granted, will alter "nothing" of the essential family character of the locality. The burden is on the Plaintiff claiming hardship to show that the character of the locality will not be altered. The record does not reflect any substantive evidence of this nature, but does include credible and reasonable testimony regarding the adverse effects of granting the variance and how the essential character of the residentially-zoned area has been and will be altered.

Based upon the history of the property, the on-site visits made to the property by the Benton County Board of Adjustment, the video tape of the premises and the testimony of residents from the area, a factual and legally sufficient basis exists for the Board's determination that the Plaintiff has not shown hardship to exist within the meaning of Benton County Development Code, 11. 5. 1 and has a rational basis for denying the variance as related to the 'hardship' factor.

13. In light of the foregoing, the Benton County Board of Adjustment's decision to deny the variance application of the Plaintiff was rationally based. It was not arbitrary or capricious and the reasons given by the Board were legally sufficient and had their basis in fact.

Issuance of a temporary injunction

14. A temporary injunction is an extraordinary equitable remedy that preserves the status quo before a trial on the merits. Krueger v. Wash. Fed. Sav. Bank of Montevideo, 406 N.W.2d 543, 545-46 (Minn. Ct. App. 1987) (citing Miller v. Foley, 317 N.W.2d 710, 712 (Minn. 1982)). The Minnesota Supreme Court in Dahlberg Brothers, Inc. v. Ford Motor Company set out the factors to be considered by the Court in

considering whether a temporary injunction of the zoning restrictions when it purchased the business and when it purchased the real estate. The Plaintiff made its application for a variance from Benton County approximately nine (9) days before the four-year period was to end. The Plaintiff's business has continued to operate since that time in violation the Defendant's ordinance in effect extending the amortization period by waiting until the 'last minute' to process its claim for a variance and its constitutional attack on the ordinance. The Defendant has an important and substantial government interest in protecting residential neighborhoods in the area from negative secondary effects of adult-use businesses.

16. "A temporary injunction should be granted only where it is clear the rights of a party will be "irreparably injured" before a trial on the merits is held." Krueger, 406 N.W.2d at 546. (quoting Miller v. Foley, 317 N.W.2d 710, 712 (Minn. 1982)). A party requesting an injunction must show irreparable harm if the injunction is not issued, while the party opposing the injunction need only show substantial harm if it is issued. Shakopee Mdewakanton Sioux (Dakota) Community, 586 N.W.2d at 410. *See* Pacific Equip. & Irrigation v. Toro Co., 519 N.W.2d 911, 915 (Minn. Ct. App. 1994).

The Plaintiff claims that enforcing Ordinance 242 and the setback requirement is unconstitutional as a violation of its First Amendment right to free speech and that having to choose between exercising its constitutional right and facing the possible misdemeanor penalty of 90 days in jail, a fine of $700 or both or foregoing the exercise of that right creates irreparable harm as a matter of law and justifies the preliminary injunction.

The argument that the ordinance is facially unconstitutional has been determined to be without merit. "Zoning ordinances which are designed to combat undesirable secondary effects of businesses dealing in

sexually explicit materials are reviewed under standards applicable to "content neutral" time, place, and manner regulations." City of St. Paul v. Carlone, 419 N.W.2d 129, 132 (Minn. Ct. App. 1988) (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 929-30, 89 L.Ed. 29 (1986)). The Plaintiff's First Amendments rights have not been improperly infringed since reasonable alternative avenues of communication are open to it. Indeed, the business, if located approximately 400 feet further away from a residentially-zoned area, would be free to engage in exactly the same business activity it now practices. Since Benton County's Ordinance 242 is not facially unconstitutional and the Plaintiff is not restricted from exercising its First Amendment rights, except as to its current location, it has not demonstrated as a matter of law that it faces irreparable harm if the temporary injunction is not granted. The Plaintiff faces no more harm than that faced by all real estate purchasers in dealing with local zoning ordinances.

Combating negative secondary effects of adult-oriented businesses has been determined to be a substantial government interest unrelated to the suppression of free expression. City of Crystal v. Fantasy House, Inc., 569 N.W.2d 225, 229 (Minn. Ct. App. 1997). *See also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50-51, 106 S.Ct. 925, 930-31, 89 L.Ed. 29 (1986); and ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413, 1416 (8th Cir. 1994). The Defendant desires to protect the residential neighborhood character of its inhabitants and, more broadly, the general welfare, safety and health of its residents.

In light of the foregoing, the Defendant is substantially harmed by the granting of the temporary injunction and preventing it from the lawful enforcement of zoning codes. This outweighs the harm to be incurred by the Plaintiff in proceeding to trial and denying the temporary restraining order and injunction. The Plaintiff has failed to meet its

burden of showing irreparable harm if the injunction is not issued.

17. A Plaintiff must make a reasonably sufficient showing on the merits of its underlying claim, that it is likely to succeed on those merits and is entitled to the relief demanded. Miller v. City of Saint Paul, 363 N.W.2d at 811; Dahlberg, 137 N.W.2d at 323.

In order for the Plaintiff to succeed on the merits, it must show either that the Board's decision was arbitrary and not rationally-based or that the Ordinance violates the constitutional rights of the Plaintiff in its regulation of adult-use business establishments.

Since this Court has concluded that the denial of the variance was rationally-based, the Plaintiff has failed to succeed on this front.

In order for the Ordinance to be determined unconstitutional, the Plaintiff must prove it to be an invalid content-neutral, time, place and manner regulation. An analysis of this requirement involves two parts; considering whether the Ordinance is narrowly-tailored to serve a substantial government interest and whether it unreasonably limits alternative avenues of communication. City of Crystal v. Fantasy House, Inc., 569 N.W.2d 225, 229 (Minn. Ct. App. 1997).

As discussed, courts have consistently held that preventing the negative secondary effects associated with adult-use businesses is a substantial government interest unrelated to the suppression of free expression. Id. at 229. *See also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50-51, 106 S.Ct. 925, 930-31, 89 L.Ed. 29 (1986). The Plaintiff claims the Defendant has not met the burden of showing that the Ordinance is narrowly-tailored to a government interest because it erroneously relied upon facts and studies which were pretextual and inaccurate.

The Supreme Court has determined that "[t]he First Amendment does not require a city ... to conduct new studies

or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51, 106 S.Ct. 925, 931, 89 L.Ed. 29 (1986). In this case, the Benton County Board of Adjustment relied upon studies and evidence of negative secondary effects of adult-use businesses from the City of St. Paul; the Minnesota Attorney General's office; the City of Indianapolis, Indiana; Rochester, Minnesota; Los Angeles, California; Phoenix, Arizona; Adams County, Colorado; Amarillo, Texas; and Austin, Texas. The studies found, among other things that adult-oriented businesses increase crime in the areas, increase noise, traffic and glare, and have negative impacts on property values. The Minnesota Courts have held that a city need only prove that the ordinance targets businesses "reasonably believed to produce at least some of the unwanted secondary effects..." City of Crystal v. Fantasy House, Inc., 569 N.W.2d at 230 (citing ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413, 1416 (8th Cir. 1994)). Although the Plaintiff contends that being located in a rural setting along Highway 10 eliminates the application of studies demonstrating negative secondary effects found in urban areas, the Eighth Circuit Court of Appeals has found that negative secondary effects can result from adult-use businesses located in similar rural surroundings as the Plaintiff's business. *See* Holmberg v. City of Ramsey, 12 F.3d 140, 143 (8th Cir. 1993).

The Board also relied upon testimony from members of the public in making its determination that negative secondary effects exist from the operation of the Plaintiff's business. A municipal board may rely on nonexpert testimony to rebut expert testimony if such evidence is competent and not based upon 'non-specific' neighborhood opposition. BBY Investors v. City of Maplewood, 467 N.W.2d 631, 635 (Minn. Ct. App. 1991). *See also* SuperAmerica Group, Inc. v. City of Little

Canada, 539 N.W.2d 264, 267 (Minn. Ct. App. 1995). The public testimony gave specific examples of low property values in the area, unsafe conditions near the business, criminal behavior in and around the area of the real property and was based upon personal knowledge.

The Board considered the information given by the Plaintiff's expert, the numerous impact studies from other cities, the competent public witnesses, the bias of the party's witnesses and their credibility. It reasonably believed that the evidence it relied upon was relevant to the problems concerning it and therefore, the denial of the variance and the ordinance is narrowly-tailored to meet a substantial government interest.

The second prong of the constitutional analysis is whether there exists reasonable alternative avenues of communication of the sort employed by the Plaintiff.

The First Amendment requires only that the County not deny adult-use businesses a reasonable opportunity to locate a business within the county." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54, 106 S.Ct. 925, 932, 89 L.Ed. 29 (1986). "Each business must fend for itself in the real estate market and cope with the same problems that all prospective purchasers face." City of Crystal, 569 N.W.2d at 230 (citing City of Renton, at 54, 106 U.S. at 932).

There exist other lawful locations for the Plaintiff's business which would not violate the setback requirements of the Benton County ordinance. Therefore, reasonable alternative avenues exist within Benton County for the Plaintiff to exercise their First Amendment rights. This along with the reasonable reliance of the Board on studies and testimony that analyzed the negative secondary effects of the Plaintiff's adult-use business showing the Ordinance to be narrowly-tailored to serve a substantial government interest support the conclusion that the Ordinance is likely to be found constitutional.

In light of the foregoing, the Plaintiff is unlikely to prevail on the merits of its action and is not entitled to the temporary injunction or temporary restraining order which it seeks from the Court.

18. The public policy expressed in the statutes is to allow for local government boards to institute and enforce land use and planning regulations. Minn. Stat. 394.232 states: "Each county is encouraged to prepare and implement a community-based comprehensive plan. A community-based comprehensive plan is a comprehensive plan that is consistent with the goals of community-based planning in section 4A.08." Minn. Stat. 394.21 further grants the authority for counties to carry on county planning and zoning activities. "Subdivision 1 Except most populous counties. For the purpose of promoting the health, safety, morals, and general welfare of the community any county in the state having less than 300,000 population according to the 1950 federal census is authorized to carry on county planning and zoning activities." Minn. Stat. 394.21(1998). The ability to enforce zoning regulations is a compelling public concern, without which local governments could not control land use within its boundaries. Public policy also overwhelmingly endorses freedom of expression and rights under the First Amendment of the Constitution.

In this case, since the Plaintiff's First Amendments rights are limited by a constitutional content-neutral, time, place and manner regulation and where the State of Minnesota allows and encourages counties to institute zoning and planning activities, public policy favors the denial of a temporary restraining order or temporary injunction which would disallow the county to enforce its zoning ordinance.

19. If the temporary injunction or temporary restraining order were granted, ongoing judicial supervision of the Defendant's actions toward the Plaintiff's business would be minimal. Therefore, the administrative burden of enforcing an injunction is not a major factor.

20. When the five Dahlberg factors are weighed and considered, this Court denies the request of the Plaintiff for a temporary injunction and a temporary restraining order. The Plaintiff who seeks the injunction has not established that the legal remedy is inadequate and the injunction is necessary to prevent great and irreparable harm.

ORDER

1. The denial by the Benton County Board of Adjustment of the Plaintiff's application for a zoning variance is **AFFIRMED.**

2. The Plaintiff's requested relief in Count I of the Complaint is **DENIED.**

3. The Plaintiff's motion for a temporary restraining order and temporary injunction against the enforcement of Benton County Development Code, Ordinance 242 is **DENIED.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 2 day of April, 1999. s/
James W. Hoolihan
Judge of District Court

JUDGMENT

I hereby certify that the foregoing constitutes the Judgment of this Court.

Dated: 4-5-99

TIMOTHY R. ROBERTS
Court Administrator

By: s/Monica Tschumper
Deputy Court Administrator

PUBLIC HEARING

BENTON COUNTY BOARD OF ADJUSTMENT

RE: FILE NO. 403, KISMET INVESTMENT, INC., DBA KING'S INN

taken at

Henry's Banquet Center, 6774 Highway 25 Northeast

Foley, Minnesota

taken on

September 17, 1998

commencing at

approximately 7:00 p.m.

HUBER COURT REPORTING
NORWEST CENTER, SUITE 680
ST. CLOUD, MINNESOTA 56301
(320) 259-0824

* * * * *

I'm also alumni association, part of St. Cloud State. It alone provides scholarship funds for students, which itself -- Well, excuse me.

MR. BINNIE: We would like to go on to the township and state input.

CHAUNCEY: I have no comment from the town board.

MR. BINNIE: All right. How about the DNR input?

(No audible response.)

MR. BINNIE: All right. Now we would like to ask for people that are to speak against this variance. And I would like to hear from as many people as possible. But we have to keep this short. And we have to allow time for everyone.

MR. HANSON: My name is Lee Hanson. My address: 548 115th Street Northeast in Rice, Minnesota. I live almost immediately across the lake from the King's Inn location. I've lived there with my family for 27 years. We used to eat at the King's Inn until it closed as a restaurant and became an adult entertainment center. I really want to make three quick points here.

I'm adamantly opposed to your granting the variance for the King's Inn to continue as an adult entertainment center. Number one, I think the very bulky presentation, which I agree was very well made, tonight does not make the point that all of the requirements for the variance are satisfied.

Number one, I would submit that you don't even have the authority to grant a variance in a case where the use is a prohibited use for the land on the other side of the boundary within 500 feet, which in this case is a residential use. You don't have the authority to grant a use or -- a use within that 500-foot setback.

But even in the alternative, I would submit to you that the extensive testimony that was provided to you tonight by the people in favor of this variance showing that there would be a financial hardship is all unique to the owner of this property,

not to the character of the property. It's the character of the property now. But I would point out to you that the Rumors Restaurant and Bar, which I've frequented many, many times, also has had many new owners over the past, I think, than King's Inn has. And that's going very successfully today.

And I would submit that a restaurant and bar in the King's Inn location would work as well as a number of other things that would work. And much of the expense that was put into the King's Inn was put in after this business was purchased by this owner, and is a hardship which the statute specifically says cannot be considered by this board when being asked to grant a variance.

And I would submit a matter of opinion, and I know it's going to be opposed by people that are attempting to propose the variance that this does not change the character of the neighborhood, but I think it does. I think all the people here tonight are here to tell you that it does and that they don't want it within 150 feet of a residential neighborhood.

With respect to the employment, I think all of us in St. Cloud know that the employment -- unemployment levels in St. Cloud are at record-low levels. I understand the wish of these people to make $40 an hour. All of us would like to make $40 an hour. There are many people that are supporting families that don't make one-fourth of $40 an hour. And I would submit that all of these people can find gainful employment in St. Cloud to go to school or to support their children if this place is closed. Thank you.

MR. BINNIE: Thank you. We want to keep -- From the crowd's reaction, it sounds like we were all in -- You were in agreement with this. If you come up here, state your name, and if you kind of agree to what Mr. Hanson has said, let's go through that way, please. We want to do this as quickly as possible, so we can hear as many people as we can.

Please come up and state your name.

MR. BENIEK: My name is Gene Beniek. I'm a tax payer in Watab Township. I've lived here for 22 years. I'm

also a marriage and family therapist. And confidentiality prohibits me from giving you experiential and validated data, but it is not anecdoted.

I have clinically seen the employee -- employees, some dancers, clients, spouses, patrons of King's Inn, and I see lots of people. But I see -- I have experienced no socially redeemable value from the King's Inn's presence in business.

Secondly, I'd like to recount a phone conversation I had with the owner -- or at least supposedly -- He said he was the owner of the King's Inn, whether it was under the current ownership or an alias or some form of the ownership -- I challenged the owner the fact that I felt that he was providing an opportunity and abusing -- and providing an opportunity for people to abuse women.

Having three daughters of my own, I challenged him if he would have his own daughters dance. And he said "Absolutely not." And I said "Well, you're abusing women." And he said -- "It's a known fact," he said, "that 80 percent of the dancers have been sexually abused. That's not my fault." And I said "Well, you're just one more in a line of abusers." And he said "I have a right to make a living."

So my suggestion is that when it comes to your decision that there are some things that are greater than rights to make a living.

Lastly, I would like to just comment that, if the community does not stand up to something, then we all become part of what often happens in history that all that needs to prevail or able to prevail is for a few good people to say nothing. I think it behooves the Board to challenge the bully that rules the world.

And lastly, I would just like to comment that, in my perception, the people who are proposing this and defending it and arguing very legalistically for it are in some way advocating their own ethical rights and responsibilities for standing up for justice. Thank you.

MR. BINNIE: Thank you. Do we have any other home owners near Little Rock Lake?

MR. BRADLEY: Ron Bradley is my name, and I currently live the closest to the King's. I'm deeply opposed of granting them their wishes. I for one have to get up at 5:30 every morning and go to work. They are open until 4 o'clock in the morning. What kind of clientele do you suppose comes there at 4 o'clock in the morning? That's all I have to say.

MR. BINNIE: Anyone else?

MR. KAINZ: My name is Don Kainz. My wife and I have lived on Little Rock Lake for the last 31 years. And as we had mentioned, we also enjoyed going to the King's Supper Club when that was part of it. But since then, that whole scene has changed.

And I think one of the things that has become a very disgusting thing for me and almost feel embarrassed and ashamed is when we have friends of ours who call to get directions to come to our house, and we tell them to take such and such road. They'll say "Oh, that's by the King's." And then there's a momentary disgusted laughter and continue to go on with the discussion.

We really feel that it has blighted the area. We're concerned about property values, even though discussion has been otherwise. Yes, values may have gone up, but so have values all over the place.

We're in the construction business. And when I heard approximate values tonight spoken, that might be true, but that hasn't been substantiated either. So we ask the Board to seriously consider denying this request for variance. Thank you.

MR. BINNIE: Thank you.

MR. ROLLINGS: My name is Dave Rollings (phonetic). I live right adjacent to the King's Inn also. Now, there's been people up here talking about how safe the place is inside and about what their hardships would be if they were to close. Well, I have a lot of hardships with the place also. Their

patrons cause a lot of damage, a lot of verbal abuse, a lot of trespassing, a lot of yelling and screaming in the parking lot. So I'm definitely very against this. I've got more items, but I just want to make it short so everyone else can get a chance to speak up here. So I'm very much opposed to this. Thank you.

MR. BUKOWSKI: Do you live at the first place to the north in that trailer?

MR. ROLLINGS: That's correct.

MS. THIELEN: Hi, my name is June Thielen, and I also live by Little Rock Lake. And I've come forward to ask the Board to simply uphold the ordinance as it stands. The King's Inn does not meet the criteria for granting a variance.

Number one, the use is prohibited if it's within 500 feet of a residential neighborhood. They are requesting a change of use.

Number two, the variance is not at all in harmony with the intent of this ordinance. The ordinance was written to protect our community from the crime and blight of sexually-orientated businesses dragging with them. They are asking to be and remain in people's back yards.

Number three, the King's has no hardship of any kind. There are many other uses for this land. The plight of this landowner is self-inflected having nothing to do with the property itself. And most of all, the enormous effect of the character of this location.

The supreme court has stated in Renton versus Play Time Theaters that a community does not have to have specific evidence of negative secondary effects of a sexually-orientated business, but can rely on relative experiences of other communities of that the proof is endless. Increased crime, association with organized crime, decreased property values, these will affect our community.

And number four, from the standpoint of a wife, a mother of four, and being a woman who continually must travel

down Highway 10 and again and again and again read "Totally nude 40-girl review. VIP room. Best food in town."

Up until four years ago, this community was a strictly family-orientated community. All evidence shows no more King's. All hearts here say enough. We are reclaiming the decency in our community. We are asking you, the Board, to do what is right, what is legal, and what is fair. Strip joints do not belong in neighborhoods. And again, I request that the Board deny the variance, and I have signatures also requesting the same. Thank you.

MS. EDER: Hi, my name is Kelly Eder. I don't live by King's, but it's still a part of my life every day. My ex-boyfriend cheated on me with a stripper, or whatever you want to call her, prostitute from King's. And I hold in my hand HIV testing that I've had to take because of her and her sleeping around with her clients and other people. I know of drugs that have went on there. I know my ex-boyfriend and some of the people there that have done drugs there.

And if you talk about the alcohol, Rumors, why they have more calls there than King's does, well, when they go to Rumors, they drink there and they go to King's, go back to Rumors. So that is why there is more calls at Rumors. Alcohol being a problem there, I've seen people that are totally intoxicated there. I've even went there with my boyfriend, and we were probably way past the alcohol limit there. And it seems like there are fights there inside and out.

There is -- I don't understand how they can't go to school without working at King's. I'm 22. I graduated with some other girls from high school. I paid my own college. I got loans. I got financial aid. One girl said how she couldn't get loans. Yeah, you can. It doesn't matter what your parents make. You can get a loan no matter how much your parents make. Maybe you can't get financial aid, but you can get a loan.

I don't have a kid. That was my choice not to have a kid. But I pay my rent. I pay my car. I pay my insurance. I pay

my food. I pay everything on my own. Maybe I don't have one job making $40 an hour. But, yes, I have three jobs to pay what I want -- for what I want to get what I need.

And just I know -- I've met Keith, and he's really nice in person. But I've also heard where he has hurting girls. I can't prove any of that. But I've known -- I've heard stuff about that.

And also with having a degree in advertising, I've -- When I went there, I asked if they had food because I was hungry. And they said, no, they don't have food, but they do in back. You have to make it yourself, and usually it's for the dancers or whoever works there. That's false advertising. You can't have that in a building without having food there consecutively.

That's all I really have to say. I don't think it's a good place. And St. Cloud is a family place. It's just bringing wrong crowds there.

MR. BINNIE: Okay. Thank you.

MR. OSSMAS: My name is Aaron Ossmas (phonetic). I live in Rice. I'm concerned about King's being granted a variance to continue operation in our community. Apparently they've been existing there because of the constitutional right of expression. But also give our people -- our government the right to regulate businesses for the overall welfare of the whole community. So our county has an ordinance which does not permit an adult-use business, as you find in the ordinance, to exist within 500 feet of the residentially-zoned area. That's the ordinance. It's pretty straight. It could be a restaurant or a craft store, any number of businesses. But King's has chosen to be a business which does not fit the zoning standards, which include that 500-foot setback.

It asked for a variance, not for extra parking spaces or change in the slope of their land or the building of a garage in a slightly different location, but an allowance which would effectively change the integrity of the ordinance as it's been established regardless of use of the land. People from the

neighborhood are concerned. We've been hearing that. Concerned about the negative impact that we believe is already taking a place in the immediate area.

Studies show that adult use of -- the adult-use business or sexually-oriented business carries negative impacts in the surrounding area. I believe it goes farther than just looking at land value. I think the girl who just spoke helps out some of the relationship things that cause these outside any other family.

I'm a pastor of Shepherd of the Pines Lutheran Church. And I work with families, and I visit with families. In my past experience as pastor of Shepherd of the Pines, it's my opinion that families hurt when God's gift of sexuality is used to arouse an empty fantasy and how it hurts families when love is not the center or when love is taken away from one of the partners in that kind of a way.

Where citizens are concerned, even thinking of using a barrier for a residential area seems absurd where we have an adult business within 150 feet of a school, within 150 feet of a church, within 150 feet of a day-care. We don't want this precedent set. We'd like to see our ordinances upheld.

MR. BINNIE: Thank you. We'd like to keep these short.

MS. HOIHJELLE: I can do that.

MR. BINNIE: Your name, please.

MS. HOIHJELLE: My name is Carol Hoihjelle. My husband owns Rumors Bar and Grill. And my husband and I along with my three teenage boys live in the house that is immediately behind the bar.

I can tell you about a personal experience that took place back last August where I had never met Keith Keller before. And apparently he thought I was behind one of the protests that had taken place at his establishment. He was in Rumors Bar after hours. I could overhear him from my house in the middle of the night threatening my husband with his safety, threatening my husband with the welfare of his business,

threatening to bring in gangs. And I didn't know who this person was.

And Keith would probably be really happy right now to know that my husband doesn't know I'm here and to know that I'm terrified to be here, because I approached Keith at night in my pajamas, not knowing who he was, asking him who he was. And he proceeded to tell me that he owns any property there. He owns the people. He can control the people. He can muscle the people. And if I were to say anything about this establishment ever again, he'll put gangs into my husband's place of business, run us out of business, drive us out of house and home, hurt my children, and rape me. The word was "bang," Keith, if you remember correctly. I do.

MR. BINNIE: Direct your response to us, please.

MS. HOIHJELLE: I apologize. I apologize. But if you want to talk about safety and well-being, I'd like to submit this: When I first graduated from high school and I needed a job, I got an apartment that I shared with some girls. And I lived in South Minneapolis and walked to and from work, and I worried less for my safety as a teenager in South Minneapolis than I do as an adult today. That from a small community. And if Rice loves its kids, let's take care of the community then when we have a choice and a chance. Thank you.

MS. THIELEN: Hello, my name is Chelsea Thielen. And I also live by Little Rock Lake. And I can remember I used -- We went there a couple times when I was younger when it used to be a family restaurant. And I can remember having a really good time and remember it being a pleasant place.

And I'll never forget the day when we were driving by there with my mom. She said "Oh, my gosh." And I looked over and I saw the look on her face, and then I looked over at the King's Inn. And I saw the big sign that read "exotic dancing." And, at that age, I didn't quite understand what

exotic dancing meant, and my mom explained to me that it meant nude dancing.

And I -- Nights after that, I can honestly say that I had nightmares. And I never had any good thoughts about that place. I would never think about going near there. I am still uncomfortable about having that there, being a teenager. And I would request that, you know, they cannot be there. Hopefully, there's a place where me and my friends can go hangout like at parks or something that would be there instead.

MS. BENIEK: My name is Barb Beniek. I'm a resident of Watab Township, 8905 Sanbur Trail. I'm a parent and taxpayer and I'm also an educator and I've worked for the welfare of the children of this community for the past 13 years as a member of the school board in Sauk Rapids-Rice.

And I think it's a tragedy that we have this kind of opportunity for employment and for entertainment for the young adults in our community. I think it's contrary to the values of our community. And as a taxpayer, I would highly support using the money of our county to fight whatever legal battles that we have to fight.

MR. BINNIE: Thank you. Any other landowners here? Short, sweet, easy.

MR. BARTHELEMY: Make it brief. My name is Al Barthelemy. The statutes and the zoning ordinance spells out the criteria for getting variances after getting a hardship. However, it also states that economic considerations alone shall not constitute a hardship if a reasonable use of the property exists under the terms of the ordinance.

There are many uses of this business district that would be a reasonable use for this property and has been a reasonable use in the past. I think it does not comply with the criteria spelled out for granting a variance, and I strongly suggest that you deny the variance. Thank you.

MR. BINNIE: Anyone else like to speak?

MR. MAJESKI: Hello, my name is Francis Majeski. I live in Royalton. I drive by the King's to and from work. And I'd just like to counter some of the points that were made by the lawyer and also by comments of the employees.

They speak about how safe they feel when they're there. If it is so safe, why is it that they need to be escorted to and from their car?

As for hardship with employment, the other gentleman a while back mentioned that there are a lot of jobs already in St. Cloud.

And no other use? It used to be a restaurant. It cost a lot of money to convert it to its present use. It can still be a restaurant. It may cost more to convert it back.

They speak up about how many police calls have been made there versus Rumors. They have bouncers. They are meant to keep order. How many fights have been broken up without the need of calling police? But from what I understand, there have been many calls to Rumors for fights involving employees of the King's.

Also the lawyer mentioned about the definition of change of character, I'm not familiar totally with that. I was trying to listen. But he said that it does not change the character of the surrounding area because eventually that area will be used for businesses in the future. That's in the future, sir. Right now there are homes there with families. In order to fit the lawyer's definition of character of the area, those families would have to move. That's all I have to say. Thank you.

MR. SEPPELT: My name is Al Seppelt. I am here this evening not only as a Benton County Commissioner, District 2 -- By the way, that's only going to be commissioner for another three months. But I'm a concerned neighbor, husband, father, and grandfather.

The King's Inn is located in my district and community. It's not a good thing for our community. It does not represent the value of our community. I urge you to vote against this variance. I pledge the time I have left on the Board to support

you with your county resources in this decision. As you know, however, this is my community and my neighborhood and I will do what I can with what is available for the support. Thank you.

MR. BINNIE: Okay. Thank you.

MR. TIGUE: Mr. Chairman, I'd just like an opportunity to present some brief rebuttal to some of the testimony presented.

MR. BINNIE: Yes, sir. Yes.

MR. TIGUE: I'd like to call Mr. McLaughlin back, briefly.

MR. MCLAUGHLIN: Mr. Chairman, very, very briefly, one gentleman stated that the issue of property values was not proven. I direct you to Page 87 of Volume 1 of the report. You have address by address, property by property the values and the comparison which is the flaw of most of the quote "studies" close quote. There is no comparison. Empirical data clearly shows the property values are

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9.1.7 Sign Removal

(a) The applicant for a sign permit shall be deemed the owner and thus responsible for the removal of the sign within six (6) months of its discontinued use as determined by the County Assessor, or for the removal of a sign which is structurally unsafe or in disrepair as determined by the County Zoning Administrator.
(b) Signs not so removed by the owner will be removed by the County at the owner's expense.

9.2 Off-Street Parking

9.2.1 General Provisions

(a) Under no circumstances shall required parking facilities accessory to residential structures be used for the parking of automobiles belonging to the employees, owners, tenants, or customers of nearby business or manufacturing establishments.
(b) Required off-street parking space shall not be utilized for open storage of goods or for the storage of vehicles which are inoperable or for sale or for rent.
(c) Required off-street parking spaces shall be provided as determined by the County Planning Commission.

9.2.2 Location Requirements

All off-street parking facilities required herein shall be located in respect to the following:

(a) Spaces accessory to one family, two family and multiple dwellings on the same lot as the principal use served.
(b) There shall be no off-street parking space within 5 feet of any road right-of-way.
(c) No off-street open parking area containing more than 4 parking spaces shall be located closer than 15 feet from an adjacent lot zoned or used for residential purposes.
(d) Business and Industrial off-street parking spaces shall not be less than 10 feet from a property line.

9.2.3 Design Requirements

(a) Each parking stall shall be not less than 10 feet wide and 20 feet in length, exclusive of access drives. All outside parking spaces shall be clearly marked.
(b) Parking areas shall be designed so as to provide adequate means of access to public streets. Such driveway access shall not exceed 30 feet in width.
(c) All of the area intended to be utilized for parking space and driveways shall be surfaced with a material which controls dust and drainage. Parking areas for less than three vehicles shall be exempt. Plans for surfacing and drainage shall be subject to approval of the Engineer.
(d) All lighting used to illuminate an off-street parking area shall be so arranged as to reflect

the light away from adjoining property and right-of-way.

(e) All open off-street parking areas shall provide a curb or a guard of normal bumper height to ensure that no portion of a vehicle encroaches into the required setback.

(f) All off-street parking spaces shall have access off driveways and not directly off the public street.

9.3 Loading Spaces

Loading spaces shall be provided as determined by the County Planning Commission.

9.4 Drive-In Businesses

9.4.1 Location Requirements

(a) No drive-in business shall be located within 500 feet of a school or church.

(b) No drive-in shall be located within 300 feet of any residentially zoned property.

(c) No access drive shall be within 50 feet of intersecting street right-of-way lines.

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B.C. Dev. Code **Section 12**
Revised 11-16-94

12.0 Effectuation

12.1 Separability

12.1.1 It is hereby declared to be the intention that the several provisions of this Ordinance are separable in accordance with the following:

12.1.2 If any court of competent jurisdiction shall adjudge any provision of this Ordinance to be invalid, such judgment shall not affect any other provisions of this Ordinance not specifically included in said judgment.

12.1.3 If any court of competent jurisdiction shall adjudge invalid the application of any portion of this Ordinance to a particular property, building, or other structure, such judgment shall not affect the application of said provision to any other property, building or structure not specifically included in said judgment.

12.2 Appendices. The appendices to this Ordinance are intended to be a list of small tracts of land classified for land use by separate ordinances. Said tracts are too small to appear separately on the county land use map, but have been described by metes and bounds description. The following ordinances are hereby incorporated into and made a part of the designated appendices of this Ordinance.